IN THE HIGH COURT OF JUDICATURE AT BOMBAY
IN INSOLVENCY

NOTICE OF MOTION NO.153 OF 2006

IN

INSOLVENCY PEITION NO.161 OF 2006

Al Barr Finance House Ltd. . ...Petitioning Creditor

Versus

Kishor K. Mehta. ...Debtor.

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Mr. I. Andhyarujina i/b. M/s.Dave,& Girish & Co. for the Petitioning Creditor.

Mr.J. P. Sen i/b. T.N. Tripathi & Co. for Debtor.

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CORAM : DR. D.Y. CHANDRACHUD, J.

October 17, 2006.

P.C.:

The Notice of Motion has been taken out for setting aside an Insolvency Notice dated 10th August 2006. The Insolvency Notice is based on a decree passed by this Court on 5th March 2003 in Summons for Judgment No.1215 of 2001 in Summary Suit No.3351 of 2001.

2. Two submissions have been urged in support of the

Motion. The first submission is that the decree has been passed more than two years ago and a challenge to the insolvency notice based on non compliance with the provisions of Order 21 Rule 22 of the Code of Civil Procedure, 1908, can be taken in support of the application for setting aside the Insolvency Notice. Fairly it has been stated on behalf of the applicant that the issue stands concluded by the judgment delivered by a Division Bench of this Court in **Hemant M. Nabar Vs. Farohar & Co**.[1] The Division Bench answered the reference that was made to the Court by holding that the position in law is that those grounds which are available under Section 9(5)of the Presidency Towns Insolvency Act, 1909 would be the grounds available to a debtor who seeks the setting aside or discharge of an Insolvency Notice. In view of the judgment of the Division Bench, the first ground that has been urged in support of the motion cannot be accepted.

3. The second submission is that there is an ambiguity, in that in para 12 of the judgment of the Court dated 5th March 2003, the decree was passed against the "Defendant". The present motion has been taken out by the Second Defendant in the suit.

1 2005(5) Bom. C.R. 234

Now a reference to the judgment and order of this Court dated 5th January 2003 would show that the First Defendant was a Public Limited Company while the Second Defendant (the applicant before the Court in these proceedings) was sued in his capacity as a guarantor. A Letter of Credit was issued by the Bank and towards the satisfaction of the outstandings due thereunder, the First Defendant to the suit issued a cheque which was dishonoured. The decree that was sought was against both the First and the Second Defendants jointly and severally. Both the Defendants were served with the Writ of Summons and had filed appearance through a common Advocate. However, no reply was filed to the the Summons for Judgment, nor was any application for leave to defend instituted before the Court. The judgment of the Court would show that both the Defendants have been held liable, the Second Defendant, who is the applicant herein, in his capacity as a guarantor. Hence, the reference to “the Defendant” in para 12 of the judgment of the Court cannot by any means be construed to mean that the decree was passed only against the First Defendant to the suit. The decree of the Court dated 5th March 2003 was against both the Defendants to the suit.

4. No case is hence made out for setting aside the Insolvency Notice which is based on a decree which continues to hold the field.

5. The Notice of Motion is dismissed.

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